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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS DION WHITTAKER,

Defendant and Appellant.

F057098

(Super. Ct. No. MF43433)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. John D. Kirihara, Judge.

Eileen S. Kotler, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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After listening to music at a nightclub in Merced, Javier Mendoza, Antonio Miranda, and his brother Jose Miranda drove home and parked, and then "some guys jumped out, one on one side and two on the other," from a car that parked behind them.

A man with a rifle demanded money from Javier, who gave him the money from his wallet. The other two men demanded money from Jose, who yelled, "No money, no money." Shots rang out. The men drove off. Jose lay dying on the ground.

A jury found Marcus Dion Whittaker guilty of, inter alia, murder during the attempted commission of a robbery. On appeal, he argues an evidentiary issue, two instructional issues, and ineffective assistance of counsel. We affirm the judgment.

BACKGROUND

On October 24, 2008, an information charged Whittaker with the murder of Jose Miranda (count 1; Pen. Code, § 187, subd. (a)),[1] the attempted robbery of Jose Miranda (count 2; §§ 211, 664), the robbery of Javier Mendoza (count 3; § 211), the attempted robbery of Antonio Miranda (count 4; §§ 211, 664), and felon in possession of a firearm (count 5; § 12021, subd. (a)(1)) on or about April 15, 2006. The information alleged the commission of the murder during the attempted commission of a robbery (count 1; § 190.2, subd. (a)(17)(A)), personal use of a firearm (counts 1-4; § 12022.5, subd. (a)(1)), personal and intentional discharge of a firearm causing great bodily injury or death (counts 1-2; § 12022.53, subd. (d)), personal and intentional discharge of a firearm (counts 2-4; § 12022.53, subd. (c)), and personal use of a firearm (counts 3-4; § 12022.53, subd. (b)).

On November 21, 2008, a jury found Whittaker guilty of first degree murder during the attempted commission of a robbery and found him guilty as charged in all other counts but found no other allegations true. On January 16, 2009, the court imposed an aggregate sentence of a five-year determinate term – the three-year (middle) term on the robbery and a consecutive eight-month (one-third-the-midterm) term on each attempted robbery and on the felon in possession of a firearm – consecutive to a

[1] Later statutory references are to the Penal Code unless otherwise noted.

determinate term of life without the possibility of parole on the murder.[2] (§§ 190.2, subd. (a)(17)(A), 213, subd. (a)(1)(B), 664, subd. (a), 12021, subd. (a)(1).)

ISSUES ON APPEAL

Whittaker argues that (1) the admission of evidence of a prior uncharged robbery was an abuse of discretion and a denial of due process, (2) the absence of a sua sponte instruction prohibiting jury consideration of the uncharged prior on issues of identity and intent denied due process and his attorney's failure to request such an instruction was ineffective assistance of counsel, and (3) the instruction dispensing with proof of the exact date of the commission of the crimes denied due process and his attorney's failure to object to the instruction was ineffective assistance of counsel.

DISCUSSION

1. Admission of Evidence of Uncharged Prior

Whittaker argues that the admission of evidence of a prior uncharged robbery was an abuse of discretion and a denial of due process. The Attorney General argues the contrary.

Before trial, Whittaker filed a motion, on the authority of Evidence Code sections 352 and 1101, subdivision (a), to "exclude prejudicial propensity evidence" of an armed robbery of a taco truck in Merced two days before the commission of the charged crimes. On the authority of Evidence Code section 1101, subdivision (b), the prosecutor filed a motion in limine to admit evidence of the crime on issues of motive, intent, and common plan or scheme. Whittaker filed supplemental points and authorities characterizing the evidence at issue as "inherently prejudicial."

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[2] The abstract of judgment correctly shows each of the individual determinate terms but incorrectly calculates an aggregate indeterminate term of four years, not five years. On our own motion, we order the appropriate correction. (*Post,* Disposition.)

At the hearing on the motions, the court disclaimed the possibility of admissibility on the issues of motive or intent and narrowed the inquiry solely to admissibility on the issue of common plan or scheme. The court noted "a good deal of similarity" between the two cases since both involved African-American perpetrators, Hispanic victims, and a firearm, occurred within only a day or two of each other, and shared two of the same perpetrators (one of whom was Whittaker). Characterizing the issue more as one of weight than of admissibility, the court noted "sufficient similarities" between the two crimes and, citing Evidence Code sections 352 and 1101, subdivision (b), found the prior more probative than prejudicial on the issue of common plan or scheme.

At trial, several witnesses, some testifying inconsistently, some testifying reluctantly, some testifying under grants of immunity, established, inter alia, that a woman who was paid to drive for a robbery took Whittaker and Raymond Brown, both African-Americans, both armed with firearms, to the taco truck where, with a gunpoint threat to "pop" someone if he did not cooperate, they took cash, clothing, jewelry, and other property from three Hispanic men. Police searching Whittaker's residence recovered property from the taco truck robbery.

As the last of those witnesses, a former detective, had almost finished testifying, Whittaker objected on the ground that the prosecutor's last question was "interfusing the current case with the prior." Sustaining the objection, the court characterized the prosecutor's question about "the robbery/homicide that these two men were involved in" as "threading [*sic*] very dangerously close to jury confusion and prejudice." The prosecutor withdrew the question, both parties finished examining the witness, and the court, stating that the instruction the jury was about to hear would appear in the final instructions, too, read the following version of CALCRIM No. 3.75 modified to address common plan or scheme:

> "The People have presented evidence that the defendant committed the offense of robbery that was not charged in this case. You may consider

this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the robbery.

"Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden, you must disregard this evidence entirely.

"If you decide that the defendant committed the uncharged offense, you may, but are not required to consider that evidence for the limited purpose of deciding whether or not the defendant had a plan or scheme to commit the offenses alleged in this case.

"In evaluating this evidence consider the similarity or lack of similarity between the uncharged offense and the charged offenses. Do not consider this evidence for any other purpose except for the limited purpose of determining whether the defendant had a plan or scheme to commit the offenses alleged in this case.

"Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.

"If you conclude that the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the charged offenses.

"The People must still prove each element of the charges beyond a reasonable doubt.

"Once again, I give you this instruction with regard to evidence that has been introduced just recently in this case. I will read this instruction to

you along with the bulk of the instructions at the conclusion. And I'm sure counsel may refer to it in their arguments to you at the conclusion of the case."

Before deliberations commenced, the court again gave CALCRIM No. 375 as so modified in the final instructions. After trial, Whittaker filed a new trial motion on the basis of the evidence of the prior. The prosecutor opposed the motion. The court denied the motion.

The crux of Whittaker's challenge appears to be that the prior and the charged crimes were "too dissimilar to support evidence of a common plan" and, even if not, that the prior was irrelevant since identity was "the only issue in the present case." Neither aspect of his argument is persuasive. As to the first, the evidence is dispositive of the requisite similarity. Both perpetrators of the gunpoint robbery of the three Hispanic men in the prior were perpetrators of the gunpoint robbery and attempted robberies of the three Hispanic men in the charged crimes. The perpetrators who committed the prior and the charged crimes alike targeted the victims at night, gained control of the victims by the element of surprise, and used a vehicle not only to approach the victims but also to flee the crime scenes.

To establish the existence of a common plan or scheme, "the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403 (*Ewoldt*), superseded by statute on another ground as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) For example, "evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant

employed that plan in committing the charged offense." (*Ewoldt, supra,* at p. 403.) So it is here.

The second aspect of Whittaker's argument is ill-conceived. Although the court admitted evidence of the prior on the issue of common plan or scheme, the evidence was not, as he implies, somehow irrelevant to the issue of identity, since his plea of not guilty put at issue all the elements of the charged crimes, on each and every one of which the prosecutor had the burden of proof. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423.) "[B]y not disputing that the charged act occurred and raising only an alibi defense, [he] narrowed the prosecution's burden of proof," he professes. "But the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." (*Estelle v. McGuire* (1991) 502 U.S. 62, 69.) There is no requirement that a defendant dispute an element of a crime before a prosecutor may introduce relevant evidence on the issue. (*People v. Ellers* (1980) 108 Cal.App.3d 943, 953.)

The deferential abuse of discretion standard of review applies to a ruling on the admissibility of evidence of an uncharged prior. (*People v. Hoyos* (2007) 41 Cal.4th 872, 898; *Ewoldt, supra,* 7 Cal.4th at p. 405.) Our conclusion that Evidence Code section 1101 does not require the exclusion of the evidence of Whittaker's uncharged prior does not end our inquiry, however, since the potential prejudice of such evidence requires that its admission receive additional careful analysis. (*Ewoldt, supra,* at p. 404.)

First, the evidence of Whittaker's uncharged prior was not as strong as, and was less inflammatory than, the evidence of his charged crimes. That decreased the potential for prejudice. Second, Evidence Code section 352 uses the word "prejudice" to refer not to the damage that probative evidence naturally causes to a defense (*People v. Karis* (1988) 46 Cal.3d 612, 638) but rather to the "etymological sense of 'prejudging' a person or cause on the basis of extraneous factors" (*People v. Farmer* (1989) 47 Cal.3d 888,

912, overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6). His prior did not prejudge him in that way.

Our careful analysis of the record discloses no abuse of discretion. Since the premise implicit in Whittaker's due process argument is that the court's ruling was an abuse of discretion, his constitutional argument is equally meritless. (See *People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)

2. Omission of Instruction on Uncharged Prior

Whittaker argues that the absence of a sua sponte instruction prohibiting jury consideration of the uncharged prior on issues of identity and intent denied due process and his attorney's failure to request such an instruction was ineffective assistance of counsel. The Attorney General argues Whittaker forfeited his right to appellate review and, alternatively, there was neither a due process denial nor ineffective assistance of counsel.

Preliminarily, we turn to the Attorney General's forfeiture argument. Except in extraordinary cases, a court as a general rule has no duty to give a sua sponte limiting instruction. (*People v. Rogers* (2006) 39 Cal.4th 826, 864.) A narrow exception to the rule exists where "'evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.'" (*Ibid.*, quoting *People v. Collie* (1981) 30 Cal.3d 43, 64.) Here, the requisite similarity between the evidence of the uncharged prior and the evidence of the charged crimes, together with the lack of any inflammatory prejudice from the evidence of the uncharged prior, put the case squarely within the general rule, not within the exception.

As Whittaker acknowledges, the record shows that the court twice instructed the jury, first after the prosecution presented evidence of the uncharged prior and again at the end of trial, with a version of CALCRIM No. 375 modified to address common plan or scheme. (*Ante*, part 1.) As he likewise acknowledges, his attorney neither objected to the

instruction nor requested a clarifying instruction. His failure to object to CALCRIM No. 375 and to request a clarifying instruction forfeits his right to appellate review. (*People v. Valdez* (2004) 32 Cal.4th 73, 113.)

Nonetheless, in the interest of judicial economy, we choose to address the issue on the merits to preclude litigation of Whittaker's ineffective assistance of counsel argument. He argues that "[his] identity in the charged offense was speculative" and that "evidence of [his] complicity in the charged crime was weak," but eyewitness testimony refutes his arguments. Brown's brother-in-law testified he was the owner of the car Whittaker drove to the crime scene with him, Brown, and a man he had never seen as his passengers. After Whittaker, Brown, and the stranger got out, Whittaker went to the driver's side of the other car with a firearm in his hand as Brown and the stranger went to the other side of the other car. Whittaker was the only person with a firearm at the crime scene. After Brown and the other man started struggling with someone inside the other car, the brother-in-law heard Brown say, "Get 'em," saw Whittaker point his firearm into the other car, and heard a shot. As a passenger got out of Brown's side of the other car and walked toward the trunk, Whittaker walked toward the trunk, too. The brother-in-law heard more shots. When Whittaker got back into the brother-in-law's car, he had a firearm in his hand.

By its own terms, CALCRIM No. 375 as modified instructed that, if and only if the jury were to decide Whittaker committed the uncharged prior, the jury was permitted, but not required, to consider that evidence "for the limited purpose of deciding whether or not the defendant had a plan or scheme to commit the offenses alleged in this case." The instruction expressly prohibited the jury from considering that evidence "for any other purpose except for the limited purpose of determining whether the defendant had a plan or scheme to commit the offenses alleged in this case." The standard of review of an instruction challenged on appeal as ambiguous is whether there is a reasonable likelihood that the jury applied the instruction in a way that denied fundamental fairness. (See

Estelle v. McGuire (1991) 502 U.S. 62, 72-73 & fn. 3; *People v. Clair* (1992) 2 Cal.4th 629, 663.) The record shows the contrary.

The right to counsel protects the due process right to a fair trial not only by guaranteeing "access to counsel's skill and knowledge" but also by implementing the constitutional entitlement to an "'ample opportunity to meet the case of the prosecution.'" (*Strickland v. Washington* (1984) 466 U.S. 668, 684-686 (*Strickland*).) To establish ineffective assistance, the defendant must show that counsel's performance "fell below an objective standard of reasonableness" and prejudiced the defense. (*Id.* at pp. 687-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*).) To establish prejudice, the defendant must make a showing "sufficient to undermine confidence in the outcome" of a "reasonable probability" that but for counsel's performance "the result of the proceeding would have been different." (*Strickland, supra,* at pp. 693-694; *Ledesma, supra,* at pp. 217-218.) A reviewing court can adjudicate an ineffective assistance claim solely on the issue of prejudice without evaluating counsel's performance. (*Strickland, supra,* at p. 697.) We do so here. The requisite showing of prejudice is lacking since, even if Whittaker's attorney had objected to CALCRIM No. 375 or requested a clarifying instruction, the result of the proceeding would have been the same.

3. Instruction on Date of Crime

Whittaker argues that the instruction dispensing with proof of the exact date of the commission of the crimes denied due process and his attorney's failure to object to the instruction was ineffective assistance of counsel. The Attorney General argues that Whittaker forfeited his right to appellate review and, alternatively, that error, if any, was harmless.

After conferring off the record during the afternoon of the 13th day of trial and during the morning of the 14th day of trial, the record shows that the court and counsel

agreed on all of the instructions. With no objection at trial, Whittaker now challenges CALCRIM No. 207:

> "It is alleged that the crime occurred on April 15, 2006. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day."

Preliminarily, we turn to the Attorney General's forfeiture argument. As a general rule, an appellate court may, even in the absence of an objection, review any instruction affecting the substantial rights of the defendant. (§ 1259; *People v. Wallace* (2008) 44 Cal.4th 1032, 1074, fn. 7.) We choose to address the issue on the merits.

Whittaker argues that CALCRIM No. 207 impermissibly weakened his alibi defense. He focuses his argument on the testimony of a Merced restaurant employee that she saw him every 45 minutes or so during her shift on the evening of April 14, 2006, that she took him home with her when her shift ended at 2:45 a.m. on April 15, 2006, and that he stayed with at her home until about 7:00 a.m. or 8:00 a.m. on April 16, 2006, when they left together.

Whittaker's argument fails to persuade us. Rejecting an analogous challenge, *People v. Seabourn* (1992) 9 Cal.App.4th 187 held that a predecessor CALJIC instruction with "on or about" language as to the date of the commission of the crime "might confuse a jury where there is no evidence to support it" but that "under the facts here, where the entire case was based upon specific times and places, such confusion would not have taken place." (*Id.* at p. 194.) Likewise, as the information here alleges that the crimes occurred on or about April 15, 2006, so the proof overwhelmingly conforms to the pleading. Here, as in *Seabourn*, the error was harmless beyond a reasonable doubt. (*Ibid.*, citing, e.g., *Chapman v. California* (1967) 386 U.S. 18.) Finally, we note that Whittaker argues, with commendable pragmatism, "only that the error was prejudicial in conjunction with the other errors alleged." None of his other arguments was persuasive, so the harmless error of instructing with CALCRIM No. 207 stands alone.

With reference to Whittaker's ineffective assistance claim, the requisite showing of prejudice is lacking since, even if his attorney had objected to CALCRIM No. 207, the result of the proceeding would have been the same. (See *Strickland, supra*, 466 U.S. at pp. 684-694, 697; *Ledesma, supra*, 43 Cal.3d at pp. 216-218.) "A defendant is entitled to a fair trial but not a perfect one." (*Lutwak v. United States* (1953) 344 U.S. 604, 619.) Whittaker received the fair trial to which he was entitled.

DISPOSITION

The matter is remanded with the directions to the court to issue an amended abstract of judgment to reflect an aggregate determinate term of five years (not four years) consecutive to the indeterminate term of life without the possibility of parole and to send to the Department of Corrections and Rehabilitation a certified copy of the amended abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 187-188.) Whittaker has no right to be present at those proceedings. (See *People v. Price* (1991) 1 Cal.4th 324, 407-408.) In all other respects, the judgment is affirmed.

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Gomes, J.

WE CONCUR:

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Ardaiz, P.J.

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Levy, J.